NO.

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# In the
# Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, AND THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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NO. 87-5556 & 87-6112

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FRANK MORGAN,

Plaintiff-Appellee,

versus

DENNIS WHITT, Individually and in his official capacity and THE TOWN OF LAKE PARK,

Defendants-Appellants.

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Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion January 11, 1989, 11 Cir., 1989, ____ F.2d ____).
(February 27, 1989)

Before HATCHETT and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are Denied.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active not having voted in favor of it, Rehearing In Banc are also DENIED.

ENTERED FOR THE COURT:

/S/ Joseph W. Hatchett

United States Circuit Judge

Frank MORGAN, Plaintiff-Appellee,

v.

James TICE, Defendant,

Dennis Whitt, individually and in his official capacity and The Town of Lake Park, Defendants-Appellants.

Frank MORGAN, Plaintiff-Appellee,

v.

Dennis WHITT, individually and in his official capacity and The Town of Lake Park, Defendants-Appellants.

Nos. 87-5556, 87-6112

United States Court of Appeals,
Eleventh Circuit.

Jan. 11, 1989.

Before HATCHETT and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal from a judgment based on a jury verdict for compensatory damages against The Town of Lake Park and Dennis Whitt, the Town manager, and for punitive damages against Whitt, together with attorneys' fees against both defendants.

STATEMENT OF THE CASE

The plaintiff, Frank Morgan, filed a complaint against Dennis Whitt ("Whitt") and the Town of Lake Park seeking damages for alleged deprivation of constitutional rights in violation of the First, Fifth and Fourteenth Amendments, under color of state law, and wherein he also sought damages in a

pendent state claim for alleged defamation by defendant Whitt. Following the trial, the jury concluded that the plaintiff was entitled to compensatory damages of $37,500 against both defendants under 42 U.S.C. §§1983 and compensatory damages of $1,000 against Whitt under the pendent defamation claim. The jury also found in favor of punitive damages against Whitt alone for $9,000. The Town and Whitt duly filed their notice of appeal from this judgment. This is the appeal No. 87-5556.

Subsequently, Morgan filed a motion for the allowance of attorneys' fees and costs and the trial court granted plaintiff fees and costs against defendants in the amount of $44,670.88. The defendants duly appealed from this judgment and this appeal is No. 87-6112.

This Court subsequently consolidated the two appeals for consideration by this Court.

## A. APPEAL IN NO. 87-5556

### (1) Statement of Facts

The jury had sufficient evidence before it to have believed that the following occurred:

Whitt was Town manager of Lake Park from February 17, 1982 to sometime late in 1986. He first met Morgan in March, 1982, while Morgan was campaigning for a mayoral candidate who was subsequently elected. During Whitt's incumbency as Town manager, he performed certain Town matters in a way that was strenuously opposed by Morgan. As a result, Morgan criticized Whitt repeatedly, both verbally and as a writer of a weekly column in a local weekly newspaper,

Weekday. He accused Whitt of violating the city code and likened some of the actions taken by Whitt as being reminiscent of the time when Hitler came to power with the Nazi government in Germany.

During the years in question, Morgan was active in publicly supporting several candidates for Town offices. He was a former resident of Pennsylvania who moved to Florida in 1978. In Pennsylvania he had held political office for a number of years as a township supervisor and mayor of Schwenksville. At the time here relevant, it was clear from undisputed evidence that he had become a public figure within the meaning established by the Supreme Court, in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and Gertz v.

Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

As stated by the appellee:

> In Lake Park, the Town Manager is empowered "[t]o see that the laws and ordinances are enforced." Town of Lake Park Charter art. VI, § 3(a) . . . Indeed, the Charter makes him the "administrative head of the municipal government under the laws of the Town." Town of Lake Park Charter art. VI, § 1. More specifically, the Town Manager has the power to appoint and remove, subject to confirmation by the Town Commission, "all subordinate officers" of the Town, except the Town Attorney and Town Auditor. Town of Lake Park Charter art. VI, § 3(e).

On January 31, 1985, Whitt, accompanied by a Sgt. Tice, of the Town's police department, started for Auburn, New York to investigate the truth of a claim made by an employee of the Town police department that she had graduated from high school. Their investigation discovered that this statement in the employee's application

was false. At about the time the trip was to be executed, Whitt discovered that they would have to change planes in Philadelphia in order to fly to Syracuse on the way to Auburn. Thereupon, he and Tice took a stopover in Philadelphia, on their own time.

Whitt charged the couple of days of stopover against his annual leave and Tice took his stopover time as comp time. They rented an automobile in Philadelphia and drove to Schwenksville where they then sought to get information which Whitt hoped to use to counter the actions of Morgan which were intended to vilify Whitt. The airplane fare to Syracuse was increased by some $400 by reason of the stopover in Philadelphia. While Whitt charged the roundtrip fares to the Town, he testified that he did not know of the

fact that the stopover added to that cost. Whitt and Tice paid their own expenses while on the sidetrip to Schwenksville, including an overnight stay in Philadelphia.

Upon arriving in Schwenksville, Whitt and Tice went to the office of a local newspaper, The Independent, and spoke to the person in charge, Lynn Nyce. She stated then that there was no one there who was authorized to let them see the back numbers of the newspaper. During their discussion, Whitt made a statement to the effect that Morgan had become involved previously in the Schwenksville area in some sort of land development scheme and that the properties he owned had mysteriously

burned.[1]

Whitt presented his business card as city manager of the Town of Lake Park and Tice showed his police I.D. both to the newspaper people and later to the officials of Schwenksville on whom they

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1. The testimony of Ms. Nyce at this point was as follows:

A. He went on to say -- he called Mr. Morgan a crook. He said that he planned to remove him from public service, and he was going to do that by getting enough information on him to put him in jail.

Q. Did he use the words, put him in jail, or say something more specific, if you can remember?

A. He said, we're going to get enough information on him to put his ass in jail.

Q. Did he say anything else to you?

A. A number of things. That they had been visiting public places in the area. One that was mentioned was the Limerick Diner, which is about ten minutes away.

He said that they had been questioning people, and that people that knew of Mr. Morgan, didn't have anything nice to say about him.

called next. At the town hall, they had access to town minutes and had conversations with the mayor, the chief of police, other town officials and a newspaper man. The latter testified on deposition that after the meeting at the city hall, he had the impression that Morgan was in deep trouble. He stated, however, that this was of no surprise to him because of his "knowledge of Mr. Morgan." He stated: "As I say, I knew Mr. Morgan. For someone to come and say Mr. Morgan was in trouble in another state or town, would be no surprise to me."

After the sidetrip to Schwenksville, Whitt and Tice continued to Syracuse and then Auburn, New York, where they investigated the educational status of a Town employee because some doubt had arisen whether she had

truthfully stated that before her employment, she had graduated from high school in Albany. This was dealt with by both Whitt and Tice as a criminal investigation for the Town of Lake Park.

Morgan testified that after he had learned about the trip to Schwenksville, he had become fearful for his safety, saying that he was afraid his home might be bombed or that he might actually be killed, that it left him uneasy and unable to sleep normally. He thereafter, however, continued to write his weekly column and he later supported other persons, including his daughter, for election to the Town council.

(2) Issues on Appeal

I. Did the trial court err in not granting the motion of the Town of Lake Park for a judgment n.o.v.

because, either

(a) Whitt was not the final policymaker of the Town as to actions which were the subject of this action, or

(b) Because Whitt's actions were not shown to have been taken under the color of state law?

II. Did the trial court err in not granting the defendant' Whitt's motion for judgment n.o.v. at the conclusion of the case because either

(a) There was a failure by the plaintiff to show that the alleged damage was caused by action taken under color of state law, or

(b) Because there was a failure to establish by clear and convincing evidence that Whitt

had acted with actual malice?

(3) Discussion

(a) Liability Under Section 1983

(1) Liability of the Town of Lake Park Under Section 1983

The jury found both Whitt and the Town liable to Morgan on the counts of the complaint that were based on 42 U.S.C. §1983. That Section provides as follows:

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. §§ 1983.

The Supreme Court, in Monell v.

Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), held for the first time that a municipality could be held liable as a person under certain circumstances under Section 1983. The Court there said:

> We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents [on the theory of respondeat superior]. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

436 U.S. at 694, 98 S.Ct. at 2037-2038.

The first question raised by this appeal, therefore, is whether Whitt's actions amounted to an "execution of a government's policy or custom," as made by one "whose edicts or acts may fairly be said to represent official policy."

Our consideration of this question

is aided by the Supreme Court's later decision in Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Referring to the Monell case, the Court in Pembaur said:

> The conclusion that tortious conduct, to be the basis for municipal liability under §1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" -- that is, acts which the municipality has officially sanctioned or ordered.

106 S.Ct. at 1298 (footnote omitted.)

While appellee strongly argues that Whitt was the final authority of the Town of Lake park in determining official policy of the Town, he

completely fails to establish what "policy" the Town could have with respect to the investigation of a private individual not in any way connected with the Town. Not only did the plaintiff fail to prove any such policy, but it is beyond this Court's imagination to discern any such policy of any municipality.

The trial court therefore erred in charging the jury over defendant's objection that:

> The court instructs you as a matter of Florida law, that the defendant Whitt possessed final authority to establish municipal policy with respect to his actions which are the subject of this lawsuit, and that the town of Lake Park is liable for his action, if you find the actions to have been wrongful.

(Emphasis added.)

As we have stated above, this charge was incorrect not only because there was substantial dispute as to

whether Whitt was purportedly acting in an official capacity but more especially because no municipal policy was established with respect to the sort of action that Whitt was admittedly engaged in.

We conclude, therefore, that the trial court in erred in not granting judgment n.o.v. for the Town because of the failure of the plaintiff to establish the municipality's liability under the standards of Pembaur and Monell.

(2) Liability of Whitt Under Section 1983

As conceded by the appellant, a public official may act under color of state law -- as required to satisfy the predicate for liability under 42 U.S.C. §§ 1983 -- even if he is not acting pursuant to a state law if, in

performing a wrongful act which deprives another of his constitutional rights, the official is able to do so by virtue of the position he holds. Brown v. Miller, 631 F.2d 408 (5th Cir. 1980).[2] However, as indicated by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the principle involved in such a situation which is characterized as the "misuse of public power" situation is that the official who acts without legal authority is able to do so only because he is "clothed with the authority of state law." 365 U.S. at 184, 81 S.Ct. at 482, citing United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368.

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2. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

There is nothing here in the record to indicate that Whitt was clothed with the power by the Town of Lake Park to make the alleged defamatory statements about Morgan. His authority, as Town manager, if any, had no effect on what he had to say while visiting Schwenksville or upon his return to Lake Park, and that is what he is here being sued for. See Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (per curiam) (sheriff not acting under color of law when he assaulted sister-in-law).

We also conclude, therefore, that defendants were entitled to a judgment n.o.v. on the §§ 1983 counts because of a failure to establish that any conduct of Whitt that was deleterious to the plaintiff was done under color of state law.

(3) Whitt's Liability on Pendent State Claim

Whitt's principal contention in appealing from the verdict and judgment on the pendent state defamation claim is that the proof below was totally without a showing of actual malice by him in his statements. As pointed out before, it is clear that Morgan was a public figure since he "thrust himself into the vortex of [a] public issue." Gertz v. Robert Welch, Inc., 418 U.S. 323, 353, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789 (1974). The First Amendment, therefore, requires that Morgan prove by clear and convincing evidence that the statements were false and made with actual malice. Id. at 352, 94 S.Ct. at 3008. In New York Times v. Sullivan, supra, the Court defined "actual malice" as a statement made "with knowledge it was false or with reckless disregard of whether it

was false or not." 376 U.S. at 280, 84 S.Ct. at 726.

Whatever statements were made by Whitt during his visit to Schwenksville, Pennsylvania or were published by him upon his return to the Town of Lake Park, so far as anything in the record discloses, represented his honest belief. The plaintiff made no effort to show that the comments made by Whitt were false. In a general way it may be argued that he had a purpose and intent to find whatever unsavory things he could about Morgan. This does not, it seems to us, constitute the actual malice in the making of false defamatory statements that was defined by the Court in Sullivan.

We conclude, therefore, that the trial court erred in not granting Whitt's motion for judgment n.o.v. on

the pendent state defamation claim.

The judgments are therefore REVERSED.

B. APPEAL IN NO. 87-6112

This is an appeal by the appellants from the grant of attorney's fees against both appellants by the trial court. The appeal is taken to protect the interests of appellants if this Court reverses the trial court's judgments in their favor.

Since we have reversed the judgments against Whitt and the Town, Morgan cannot claim to be the "prevailing party" under 42 U.S.C. §1988.

The judgment for attorney's fees and costs is REVERSED.

THE COURT: Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdicts.

It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact, and to apply the law to the facts as you find them from the evidence.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case--that is, in reaching your decision as to the facts--it is your sworn duty to follow the law as the Court is now in the process of defining for you.

Unless otherwise stated, you should consider each instruction to apply separately and individually to each Defendant on trial.

Further, you must follow all of the

Court's instructions as a whole. You have no right to disregard or give special attention to any one particular instruction, or to question the wisdom or correctness of any rule of law the Court may state to you.

That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as given to you, regardless of the consequences.

That is the promise you made and the oath you took before being accepted by these parties as jurors in this case, and they have the right to expect nothing less.

By the same token, it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy.

In your deliberations, you are to

consider four distinct claims:

First, the claim of Frank Morgan against Dennis Whitt for slander.

Second, the claim of Frank Morgan against Dennis Whitt for invasion of privacy.

Third, the claim of Frank Morgan against Dennis Whitt for deprivation of constitutional rights brought under 42 United States Code, Section 1983.

Fourth, the claim of Frank Morgan against the Town of Lake Park for deprivation of constitutional rights brought under 42 United States Code, Section 1983.

Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party.

Therefore, in your deliberations,

you should consider the evidence as it relates to each claim separately, as though each claim was tried before you separately.

Although there are two Defendants in this action, it does not follow from that fact alone that if one is liable, both are liable.

Each defendant is entitled to a fair consideration of his own defenses, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. Unless otherwise stated, all instructions given you, govern the case as to each defendant.

Members of the jury, in determining the believability of any witness and the weight to be given to his or her testimony, you may properly consider the demeanor of the witness while

testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; the interest of the witness, if any, in the outcome of the case; the means and opportunity the witness had to know the facts about which he testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness; considered in light of all the evidence in the case, and in the light of your own experience and common sense.

The party with the burden of proof on any given issue, has the burden of proving every disputed element of his claim to you by a preponderance of the evidence.

If you conclude that the party bearing the burden of proof has failed

to establish his claim by a preponderance of the evidence, you must decide against him on the issue you are considering.

What does a preponderance of the evidence mean? To establish a fact by a preponderance of the evidence, means to prove that the fact is more likely true than not true.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents.

In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced

them.

If you find that the credible evidence on a given issue is evenly divided between the parties--that it is equally probably that one side is right, as it is that the other side is right--then you must decide that issue against the party having this burden of proof.

That is, because the party bearing this burden must prove more than simple equality, he must prove the element at issue by a preponderance of the evidence.

On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof--that what the party claims is more likely true than

not true--then that element will have been proved by a preponderance of evidence.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply in a civil case such as this, and you should put that standard out of your mind.

The first claim of Plaintiff in the case for your determination is on the defamation claim of the Plaintiff against the Defendant, Dennis Whitt. There is no defamation claim against the Defendant, Town of Lake Park.

The defamation claim is only against the Defendant, Dennis Whitt, and the issues for your determination are as follows:

(1) Whether Whitt made the false

statements to members of the public alleged by Plaintiff concerning Plaintiff as defined by these instructions; and, if so,

(2) Whether Defendant Whitt's statements concerning Plaintff tended to expose Plaintiff to hatred, ridicule, or contempt, or tended to injure Plaintiff in his occupation or profession.

If the preponderance of the evidence does not support the defamation claim of Plaintiff, then your verdict should be for Defendant, Mr. Whitt.

If, however, the preponderance of the evidence does support the claim of Plaintiff, then you shall consider the defense of privilege raised by Defendant Whitt.

On this defense, the issue for your determination is whether all statements made by Defendant Whitt were privileged.

If the preponderance of the evidence supports this defense of Mr. Whitt, your verdict should be for Mr. Whitt. If, however, the preponderance of the evidence does not support this defense, and the preponderance of the evidence does support the claim of Frank Morgan, then your verdict should be for Frank Morgan and against Mr. Whitt.

And I will define privilege for you in just a moment. A statement or suggestion that a person has committed a crime or criminal acts, or that a person is dishonest, constitutes defamation, per se.

If you find from a preponderance of the evidence that Defendant Whitt stated or suggested that the Plaintiff Morgan committed crimes or criminal acts, you need not make a specific finding that the Plaintiff was damaged, but may

presume that the Plaintiff was damaged, and award him such sum as you believe fully and fairly compensates him for such damage.

The second claim of Plaintiff against the Defendant, Mr. Whitt, individually, is for invasion of privacy.

One who gives publicity to a matter concerning another that places the other before the public in a false light, is subject to liability to the other for invasion of his privacy, if:

(1) The false light in which the other was placed would be highly offensive to a reasonable person; and

(2) The actor had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

If the preponderance of the evidence supports the invasion of privacy claim for Plaintiff, then your verdict should be for Plaintiff Morgan.

If, however, the preponderance of the evidence does not support the claim of Plaintiff Morgan, then your verdict should be for Defendant Whitt.

The Court has found, and now instructs you as a matter of law, that Mr. Morgan, the Plaintiff herein, was a public figure.

A qualified privilege extends to a person who makes statements about a public figure or public official. The privilege protects the maker of such statements, as long as the statements are comment and opinion or are false statements made without malice.

This privilege applies to the case of defamation in this cause.

The third claim of the Plaintiff is for a violation of Title 42 United States Code, Section 1983. In that count, Plaintiff alleges that both Defendants, acting under color of state law, deprived him of rights and privileges guaranteed to him by the United States Constitution, and by an Act of Congress which provides for equal rights of all persons within the jurisdiction of the United States.

The Plaintiff alleges that he suffered or sustained personal injuries as a result of the Defendants' actions, and seeks an award of damages for these injuries.

In particular, the Plaintiff alleges that the Town of Lake Park and Mr. Whitt launched an investigation of Plaintiff in retaliation for Plaintiff's criticism of Mr. Whitt and the Town

government.

During that investigation, the Plaintiff alleges that Mr. Whitt made certain false and defamatory statements. Plaintiff also alleges that Defendant Whitt committed torts of defamation and invasion of privacy.

The Plaintiff alleges that the Defendant took these actions under color of the laws of the State of Florida and the customs and policies of the Town of Lake Park, and therefore deprived the Plaintiff of the rights and privileges secured and protected to him by the constitution and laws of the United States; namely, the constitutional right not to be investigated or otherwise harassed for criticizing public officials, and the right not to be stigmatized based solely on his criticism of public officials.

You are instructed, as a matter of law, that under the constitution of the United States, every person has the right not to be deprived of liberty without due process of law.

Every person also has the right under the constitution to be free from unreasonable searches or investigations.

You are further instructed, that Section 1983 of Title 42 of the United States Code, provides that any citizen may seek redress in this Court by way of damages against any person or persons, who, under color of any State law or custom, subjects such citizen to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States.

Acting under color of state law means, under pretense of law, and simply

means acting in one's capacity as, in this case, police officers or City officials.

The color of law requirement can be satisfied when a person who is affiliated with a state or municipal government has used his position to deprive another of his constitutional rights.

Thus, the color of law requirement can be satisfied where a dispute is motivated by purely personal reasons, provided the alleged misuse of power is made possible because the alleged wrongdoer is clothed with the authority of state law.

As I have said, the Fourteenth Amendment of the federal constitution provides that no state shall deprive a person of his liberty without due process of law.

The liberty of the individual, which the federal constitution thus secures and protects, is not an absolute and unqualified freedom privilege [sic] to do as one pleases at all times and under any circumstances; but is always subject to reasonable restraints, including of course, such restraints as are imposed by law.

The Plaintiff in this case, in common with the Defendants and all other persons living under the protection of our constitution, had the legal right at all times not to be deprived, without due process of law, of any liberty secured or protected to them by the constitution or laws of the United States.

The Plaintiff had a liberty interest in not being stigmatized based solely or substantially on his criticism

of public officials.

To be deprived of liberty without due process of law, means to be deprived of liberty without authority of the law. In order to prove his claim under the civil rights claim contained in this action, the burden is upon the Plaintiff to prove and establish, by a preponderance of the evidence, the following facts:

First, that Plaintiff has been stigmatized in, or as a result of, the investigation process, by false and disparaging allegations of criminal activity.

Second, that Defendant Whitt acted under color of state law, or municipal ordinance, in going to Schwenksville and Collegeville, Pennsylvania to make inquiries and obtain information relating to Frank Morgan.

Third, that these acts and conduct deprived Frank Morgan of his federal constitutional right of free speech, and of his federal constitutional right not to be deprived of his liberty without due process of law.

Fourth and finally, that these acts and conduct proximately caused Frank Morgan to sustain injury to his feelings and to his ability to exercise his right of free speech.

In respect to the 1983 claim as against the Town of Lake Park, the Plaintiff, in order to prevail as against that Defendant, must prove each of the following elements by a preponderance of the evidence:

First, that the Defendant Whitt acted under color of state law, or muncipal ordinance, in going to Schwenksville and Collegeville,

Pennsylvania to make inquiries and obtain information relating to Frank Morgan.

Second, that in undertaking these inquiries and obtaining this information, Dennis Whitt's conduct represented official policy of the Town of Lake Park.

Third, that these acts and conduct deprived Frank Morgan of his federal constitutional right of free speech, and of his federal constitutional right not to be deprived of his liberty without due process of law.

And finally, that these acts and conduct proximately caused Frank Morgan to sustain injury to his feelings, and to his ability to exercise his right of free speech.

An injury or damage is proximately caused by an act, or a failure to act,

whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one person.

On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

The Plaintiff is entitled to receive damages if the Defendant or Defendants took actions which resulted

in a violation of the Plaintiff's rights.

It is not necessary to find that any of the Defendants intended to deprive the Plaintiff of his civil rights, in order to find in favor of the Plaintiff on his civil rights claims.

The Town of Lake Park is a person within the meaning of Section 1983, and may be held liable for violations of civil rights which are the result of Town policy, custom, or practice.

The Town is liable for the acts of [sic: or] orders of Town officials who possess final authority with respect to such actions or orders.

When an official has final authority in a matter involving the selection of objectives or of means of achieving objectives, his choices represent governmental policy.

The Court instructs you, as a matter of law, that the Defendant Whitt possessed final authority to establish municipal policy with respect to his actions, which are the subject of this lawsuit, and that the Town of Lake Park is liable for his actions, if you find those actions to have been unlawful.

Also, the question of whether or not Mr. Whitt properly or improperly expended public funds is not an issue in this case, and should not be considered by the jury in any way in arriving at a fair and impartial verdict in this case. That is another question for another day.

The fact that a particular official--even a policy-making official--has discretion in the exercises of particular functions, does not, without more, give rise to

municipal liability, based on an exercise of that discretion.

The official must also be responsible for establishing final government policy respecting such activity, before the muncipality can be liable.

That is, municipal liability under 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

If you find for the Defendants on each of the claims--that is, on the defamation claim, the invasion of privacy claim and find on behalf of both Defendants as to the 1983 claim--you will not consider the matter of damages.

If you find for the Plaintiff, however, you must then determine what amount of damages, if any, to award the Plaintiff for compensation for his injury.

In arriving at an award of damages in this case, you should consider the following types of damages:

One, you may award the Plaintiff such actual compensatory damages as you find from a preponderance of the evidence, are proximately caused by any acts of the Defendants which were contrary to law.

Two, you may also award the Plaintiff nominal dollars for the deprivation of his constitutional rights.

Third, if you find for the Plaintiff and against Defendant Whitt, you must decide whether it appears from

a preponderance of the evidence in the case that the acts and conduct of Defendant Whitt, toward the Plaintiff at the time and place in question, were willful and with gross disregard for Plaintiff's rights; and if so, what amount, if any, punitive exemplary damages should be added to the award of actual compensatory or nominal damages against Defendant Whitt.

As to Defendant Whitt, you may award punitive or exemplary damages in addition to actual or compensatory, or nominal damages without punitive damages, all in accordance with the facts as you find them and from these instructions.

The fact that Plaintiff's rights have been found to be violated, in itself, entitles him to damages. Therefore, if you find for the Plaintiff

on the issue of liability, you must then fix--

Sorry, I think I got that in here twice. Do I?

MR. GREEN: No.

THE COURT: No? Okay. Therefore, if you decide for the Plaintiff on the issue of liability, you must then fix the amount of money damages which will reasonably and fairly compensate him for the wrongful conduct of the Defendants, which was a substantial factor in bringing about.

In seeking such award, you should consider and may award damages for the following injury and harm:

One, the violation of his constitutional rights to be free from unreasonable investigations.

Secondly, the emotional and mental harm to the Plaintiff during and after

the investigation, including fear, humiliation, mental anguish, and any emotional harm, fear or mental anguish that Plaintiff will, with reasonable certainty, suffer in the future.

And finally, the extent and duration of the injury, as I have said, including their reasonable certainty to continue in the future.

You may also decide whether the Plaintiff is entitled to an award of punitive damages against Defendant Whitt. In a case like this, you may consider whether acts or omissions of Mr. Whitt, if you find them to be proved, were so serious that Defendant Whitt should pay a penalty, so that in the future, others will be deterred from engaging in the same conduct.

Whether you decide to award any punitive damages, should be based on

whether you decide that Defendant Whitt engaged in conduct evidencing ill will, hostility, or evil intention to defame and injure.

In making an award of punitive damages, if any, against Mr. Whitt, you may consider Mr. Whitt's net worth in arriving at a fair and impartial award.

I should caution you, members of the jury, that you may not make an award of punitive damages unless you first find that the Plaintiff is entitled to compensatory damages.

Upon retiring to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court.

A form of verdict has been prepared for your convenience, and I shall now read it to you:

Verdict, we, the jury, return these verdicts--and this is a verdict we call by special interrogatories--and there are a number of questions here, and I'll read those to you.

One, as to the claim of the Plaintiff, Frank Morgan, that his civil rights were violated by the Defendant Whitt, we find--either for the Plaintiff or for the Defendant.

Your foreman or forewoman should insert your finding by putting a check mark in the appropriate box.

The second question is, as to the claim of the Plaintiff, Frank Morgan, that his civil rights were violated by the Defendant, Town of Lake Park, we find--again, either for the Plaintiff or for the Defendant.

Again, your foreman or forewoman should put an X in the appropriate blank

as provided.

Three, as to the claim of the Plaintiff, Frank Morgan, of defamation by the Defendant, Dennis Whitt, we find--either for the Plaintiff or for the Defendant.

There again, a blank space is provided for you to insert your finding.

Four, as to the claim of the Plaintiff, Frank Morgan, of invasion of privacy by the Defendant, Dennis Whitt, we find--either for the Plaintiff or for the Defendant.

Again, there is a blank space provided for you to indicate your finding.

If you answer the first four questions in the negative, as I said, then you do not consider the issue of damages. That is, if you find for the Defendant, in which case you answer the

first four questions in the negative, you should then have your foreman or forewoman fill in the date, sign it, and return it to the court as your verdict.

If you find for the Plaintiff on any of the first four questions, you should then proceed to consider number five:

Compensatory damages for defamation and/or invasion of privacy are hereby assessed in favor of the Plaintiff, Frank Morgan, and against the Defendant, Dennis Whitt, in the amount of--and you will see a blank space is provided with a dollar sign to the left, and you should insert in that blank space the sum that you deem appropriate under the facts and law of the case; making certain to insert dollars and cents.

Question number six, compensatory damages for violation of 42 United

States Code 1983 are hereby assessed in favor of the Plaintiff, Frank Morgan, and against the Defendants, Dennis Whitt and the Town of Lake Park, in the amount of--blank dollar.

And, again, you should insert what amount, if any, you deem appropriate under the facts and law of the case.

Finally, punitive damages are hereby asessed in favor of the Plaintiff, Frank Morgan, and against the Defendant, Dennis Whitt, in the amount of--blank dollars.

And there you should insert whatever finding you may make as to the issue of punitive damages. Punitive damages are an award within your discretion, you may or may not award them. However, as I said earlier, you can not make an award of punitive damages unless you have made an award of

compensatory damages.

You will take the verdict form to the jury room, and when you have reached unanimous agreement as to your verdicts, you will have your foreman or forewoman fill it in, date and sign it, and then return it to the courtroom.

If during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, have it signed by your foreman or forewoman, and pass it to the U.S. Marshal, who will then bring it to the Court's attention.

We will then respond to whatever question you may have, as promptly as possible; either in writing, or by having you returned to the courtroom so you may be addressed orally.

You are cautioned, however, that with regard to any question or message

you may send, that you should never state your numerical division at the time. In other word, don't say, two of us want to know, or one of us wants to know, or five of us think.

(Alternate juror excused with the thanks of the Court)

THE COURT: Certain of the exhibits that have been received in evidence will be assembled and delivered to you by the Clerk in just a few minutes, to assist you in the course of your deliberations.

I remind you, again, ladies and gentlemen, your verdicts in this case must be unanimous; that is, they must be concurred in and agreed in by each of you before it is returned to the Court as your verdict.

With those instructions, you may now retire in the consideration of your verdict.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-8241 Civ-Gonzalez

FRANK MORGAN,

Plaintiff,

vs.

DENNIS WHITT, individually, and in his official capacity, and THE TOWN OF LAKE PARK, a Florida municipal corporation,

Defendants.

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JUDGMENT

THIS ACTION came on for trial before the Court and a jury, Honorable Jose Gonzalez, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED that the plaintiff, FRANK MORGAN, recover of the

defendant, LLOYD DENVER WHITT, also known as DENNIS WHITT, the sum of Ten Thousand Dollars ($10,000.00), with interest thereon at the rate of 6.3% as provided by law, and his costs of action, and further recover of the defendants, LLOYD DENVER WHITT, also known as DENNIS WHITT, and THE TOWN OF LAKE PARK, a Florida municipal corporation, the sum of Thirty-Seven Thousand, Five Hundred Dollars ($37,500.00), with interest thereon at the rate of 6.3% as provided by law, and his costs of action.

DATED at Fort Lauderdale, Florida,

on the 27th day of April, 1987.

/S/ Jose A. Gonzalez

United States District Judge

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-8241 Civ-Gonzalez

FRANK MORGAN,

Plaintiff,

vs.

DENNIS WHITT, ET AL.,

Defendants.

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VERDICT

We, the jury, return these verdicts:

1. As to the claim of the plaintiff, FRANK MORGAN, that his civil rights were violated by the defendant, DENNIS WHITT, we find:

__X__ for the plaintiff

____ for the defendant

2. As to the claim of the plaintiff, FRANK MORGAN, that his civil

rights were violated by the defendant, TOWN OF LAKE PARK, we find:

__X__ for the plaintiff

____ for the defendant

3. As to the claim of the plaintiff, FRANK MORGAN, of defamation by the defendant, DENNIS WHITT, we find:

__X__ for the plaintiff

____ for the defendant

4. As to the claim of the plaintiff, FRANK MORGAN, of invasion of privacy by the defendant, DENNIS WHITT, we find:

__X__ for the plaintiff

____ for the defendant

5. Compensatory damages for defamation and/or invasion of privacy are hereby assessed in favor of the plaintiff, FRANK MORGAN, and against the defendant, DENNIS WHITT, in the amount of $1,000.00.

6. Compensatory damages for violation of 42 U.S.C. 1983 are hereby assessed in favor of the plaintiff, FRANK MORGAN, and against the defendants, DENNIS WHITT and TOWN OF LAKE PARK, in the amount of $37,500.00.

7. Punitive damages are hereby assessed in favor of the plaintiff, FRANK MORGAN, and against the defendant, DENNIS WHITT, in the amount of $9,000.00.

SO SAY WE ALL.

DATED this 15 day of April, 1987.

/S/ Joyce M. Taylor

Foreperson

PLAINTIFF'S PROPOSED JURY INSTRUCTION

NO. 12

Municipal Liability

The Town of Lake Park is a person within the meaning of Section 1983 and may be held liable for violations of civil rights which are the result of Town policy, custom, or practice. The Town is liable for the acts of orders of Town officials who possess final authority with respect to such action(s) or orders. When an official has final authority in a matter of involving the selection of objectives or of means of achieving objectives, his choices represent governmental policy. The Court instructs you as a matter of Florida law, that the Defendant Whitt possessed final authority to establish municipal policy with respect to his

actions which are the subject of this lawsuit, and that the Town of Lake Park is liable for his actions, if you find the actions to have been wrongful.